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No. 652.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

FRANKLIN SUGAR REFINING COMPANY, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

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STATEMENT.

The sugars referred to in this case were all imported at the port of Philadelphia on September 29, 1903, and entered in bonded warehouse.

Those covered by protests 139,779 and 139,780 (R., 20, 22) were withdrawn and actually removed from the warehouse prior to December 27, 1903, the date when the reciprocity treaty with Cuba became operative, according to the contention of the Government.

The 4,529 bags of sugar and 67 bags of sugar sweepings covered by protest 129,306 (R., 7) were not actually removed from the warehouse until December 28 and 29, 1903, but on October 10, 1903, withdrawal

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entry had been made for the same, the estimated duties paid, and a delivery permit therefor filed with the storekeeper.

All the sugars were assessed by the collector at the full rates provided by the tariff act of 1897, and this assessment was sustained by the Board of General Appraisers and the Circuit Court.

The questions raised by the importer are:

1. That the reciprocity treaty with Cuba went into effect in this country on April 10, 1903, or at least not later than December 17, 1903, the date of the act of Congress passed in execution of it.

2. That the sugars not actually removed from the bonded warehouse until after December 27, 1903, can not be held to have been withdrawn prior to that time.

3. That as the liquidation of the duties upon all these sugars did not take place until after December 27, 1903, they should have been assessed at the rates fixed by the treaty, even if it did not go into effect until that date.

ARGUMENT.

I.

When the treaty took effect.

This question has been discussed, and the historical facts in connection therewith set forth, in the Government's brief in No. 269, *United States* v. *American Sugar Refining Company*, and further argument is perhaps unnecessary. We desire, however, to refer briefly to certain contentions made by counsel at the argument and in their brief.

It is said that the treaty is a contract, and should be construed so as to carry out the intentions of both the contracting parties. This is undoubtedly the correct principle, but we think its application to the facts of this case is disastrous to the contention of the importer that the treaty took effect retrospectively on April 10, 1903.

Clearly the best evidence of the intention of the parties to a contract is the practical construction which they have mutually put upon it. Now both the United States and Cuba, through their respective Presidents, have put this treaty into effect on the same day, December 27, 1903, to operate prospectively. Several sessions of Congress have come and gone since the proclamation of the President was issued, without a murmur on the part of that body to indicate that it

thought its mandate, contained in the act of December 17, 1903, had been disregarded. The Cuban legislature has been equally quiescent. Both parties to the treaty—the Government of the United States and the Government of Cuba—are apparently perfectly satisfied that the true intent of the treaty has been observed. It is private parties alone, who had nothing to do with the making or enforcement of the treaty, who desire the court to disturb this harmonious condition, by holding that the treaty went into effect in this country either eight months or ten days before it took effect in Cuba. Manifestly the question as to when the treaty should be put into effect was a matter for the determination of the political departments of the Government—in this case Congress and the President—and their action in that regard must, under the well-settled rule, be respected by the courts.

The only ground suggested by the importers in support of their contention that the treaty should be held to have gone into effect on April 10, 1903, is that otherwise the provision that it should continue in force for five years will be impaired. How will that provision be impaired? The language of Article XI is that said convention "shall continue in force for the term of five years from date of going into effect." A change in that date, mutually accepted and agreed upon by both parties, in no wise impairs the provision that it shall continue in force for five years therefrom.

The several stipulations as to the time when the treaty should become operative show beyond all doubt

that it was intended to operate prospectively, and not retrospectively. First, ratifications were to be exchanged on or before January 31, 1903, and the treaty take effect ten days thereafter; then the time for exchanging ratifications was extended until March 31, 1903, the treaty to take effect ten days thereafter; then it was provided that the treaty should not take effect until approved by Congress, and Congress in the act to carry it into execution provided that the President should first ascertain whether Cuba had made provision to give full effect to it, issue his proclamation of fact, and "*thereupon*" the duties were to be reduced. In like manner, as pointed out by this court in the Burr case, Congress in passing the tariff act of 1894 evidenced its intention that that act should operate prospectively by changing from time to time an earlier to a later date when it should go into effect. Besides, in this case there is no ambiguity in the treaty itself. Its language is entirely prospective. The only doubt is suggested by the act of Congress passed to carry into execution the treaty.

It is further contended that the President has no constitutional authority, acting alone, to change a law or treaty. Admitted. But it is his constitutional right and duty to execute both laws and treaties, and that is all he has done in this case. The act of Congress, passed to carry into effect the treaty, had, by reason of the evident mistake of that body as to the exchange of ratifications, complicated the situation, and the President was called upon to place that construction

upon it which would best subserve the real intention of Congress and of the parties to the treaty, in order to prevent the treaty from failing altogether. The action he took was entirely proper for the purpose, and as it has been acquiesced in by all concerned, should be respected by the courts. To hold that the treaty went into effect upon any other date than that fixed by both countries would be to violate its obligations and place this country in a most absurd position.

On page 21 of their brief, counsel for importers, after arguing that it was the intention of the parties to the treaty that it should go into effect on the tenth day after the exchange of ratifications, say:

> Nothing appears in the record disclosing any intention on the part of either of the contracting parties, *certainly not on the part of the Republic of Cuba*, to alter the time of commencement.

In other words, they ask this court to assume, *contrary to the fact*, that the treaty went into effect in Cuba as of April 10, 1903, although it was not put into effect in this country by the President until December 27, 1903.

It is inconceivable that if the Circuit Court for the Southern District of New York had been advised of the fact that the treaty had been put into operation in Cuba on the same date that it went into effect in the United States, it would have held that it went into effect here retroactively as of April 10, 1903. Whether the Circuit Court for the Eastern District of Pennsylvania was wiser on this point does not appear. But

even in the absence of any evidence on the subject, a moment's reflection would have told them that the President would not have put the treaty—a reciprocal arrangement, involving mutual concessions—into effect in this country at a different date from that on which it became operative in Cuba.

Counsel refer to the fact that the exchange of ratifications of the treaty on March 31, 1903, was published at the time in some of the newspapers, as discrediting the suggestion that Congress when it passed the act to carry into effect the treaty might have supposed that such exchange had not occurred. We do not think so. Congress was not in session at that time, and while some of its members might have read of the exchange, it is not improbable that if they did so they had forgotten it when Congress met the next November; and, as shown in our brief in No. 269, the President at that time in no way referred to it in his communications to that body. The fact remains, therefore, that *Congress* was never advised of the exchange of ratifications. We credit the importers and their counsel with the same amount of knowledge that they impute to members of Congress, and yet it appears from their protest in No. 269 (p. 6) that they themselves were ignorant of the fact that ratifications had been exchanged on March 31, 1903, and gathered their information from the terms of the original treaty, for they said in their protest that ratifications had been exchanged, as provided in the treaty, on *January* 31, 1903.

Of course we offer this suggestion merely as a reasonable explanation of the reference in the act to the exchange of ratifications. If no satisfactory explanation can be given therefor, the fact remains, as shown by all the circumstances of the case, that both the treaty and the act were intended to operate prospectively.

II.

The sugars not actually removed from the bonded warehouse until after December 27, 1903, but for which withdrawal entry had been made and permit to deliver issued prior to that date, were properly held to have been withdrawn before the treaty took effect.

Section 20, Customs Administrative Act, as amended by act December 15, 1902 (32 Stat., 753), provides:

> SEC. 20. That any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided, That the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal: And provided further,* That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.

In *Mosle* v. *Bidwell* (130 Fed., 334), the Circuit Court of Appeals for the Second Circuit held that the first proviso, added by the act of December 15, 1902, was simply declaratory of the meaning of the original provision.

In this case the record shows that on or before October 10, 1903, withdrawal entry was made for the 4,524 bags of sugar and 67 bags of sugar sweepings covered by protest 129,306, and that the estimated duties were paid thereon and a delivery permit issued to the storekeeper on the same date. (R., 10, 11, 13, 34–35.)

This was a constructive withdrawal of the goods. The fact that the importer allowed the goods to remain in the warehouse for some time thereafter is immaterial. In no proper sense could they be said to be warehoused, within the meaning of the statute, after being formally withdrawn and a delivery permit issued. The storekeeper then held them, not for the Government, but for the importer, they being at his sole disposition and control. (R., 34, 35.)

This court has held that goods are to be deemed to have been warehoused from the time of the arrival of the ship, because from that time they are in the custody and control of the Government, although not actually deposited in the warehouse until later.

Hartranft v. *Oliver*, 125 U. S., 525.
Seeberger v. *Schweyer*, 153 U. S., 609.

In *Seeberger* v. *Schweyer* the court said (pp. 611–613):

> The case of *Hartranft* v. *Oliver* (125 U. S., 525, 528) is cited as holding that goods in process of transportation, under charge of the customs officers, are in effect already warehoused, within the meaning of the customs laws. That was where the imported article—salad oil—arrived in a vessel at the port of Philadelphia on Saturday, June 30, 1883, and was

entered at the custom-house at 2 o'clock in the afternoon. It was not practicable to remove the goods on that day, and the next day was Sunday. On July 7 the cases were entered in bond at the custom-house, and on the same day the importer made a withdrawal entry for the goods, and offered to pay the collector duty thereon at the rate of 25 per cent ad valorem, but the collector exacted a specific duty of 25 cents per gallon, a change of rate of duty having gone into effect on July 1, and the court held, per Mr. Justice Field, that "goods on board a ship, in charge of a custom-house officer, preliminary to their removal to a public store or a bonded warehouse, and during the time necessary for that purpose, are in like custody, and so are within the spirit and intent of the law, subject only to such duties as are leviable when the goods are freed from such custody. So far as the Government is concerned, they are in the same position as if technically in a public store or bonded warehouse. *When in either of these places, they can not be removed without a permit from the collector.* When on shipboard, in charge of a custom-house inspector, they are in the same condition, and can not be removed without a like permit. * * * The act of Congress of March 28, 1854, which is now embraced in section 2971 of the Revised Statutes, in providing for the deposit of goods in public stores and bonded warehouses, declares that "any goods remaining in public store or bonded warehouse beyond three years shall be regarded as abandoned to the Govern-

ment;" and in the construction of this clause the Treasury Department has decided that the period limited for their remaining in a public store or a bonded warehouse includes the time on shipboard after the arrival of the ship in port. (Treasury Regulations of 1857, art. 483.)

If, then, goods remaining on a vessel after arrival at the port of New York, and when the vessel is in charge of a custom-house officer, are to be regarded, within the customs laws, as within the custody of the Government in the same sense as if they had been actually discharged into a custom-house or bonded warehouse, it would seem to follow that when goods have arrived at the port of New York, and the arrival of the vessel has been reported at the custom-house, and then the goods, with the consent and allowance of the collector, under the provisions of the first and second sections of the act of June 10, 1880, have been shipped to Chicago, such goods must be deemed to have been warehoused from the time of the arrival of the ship.

In *Hartranft* v. *Oliver*, the court also said (p. 528):

> There is manifest justice in the rule that goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by law *when he is at liberty to take possession of them.*

The previous statement in that opinion that "when in either of these places [a public store or bonded warehouse] they can not be removed without a permit from the collector," shows conclusively that the

court considered the importer's right to take possession of the goods as accruing at the time of the issuance of a permit, and that the goods should be subject only to such duties as were leviable *at that time.*

If, as held in the above cases, the period of warehousing begins from the time of importation, because the goods from that time are in the custody and control of the Government, it follows logically that the period of warehousing must be held to end when the withdrawal entry is made and a permit to deliver issued, because they then cease to be in the custody and control of the Government, the possession of the storekeeper being possession for the importer and the goods being then subject to the latter's absolute control.

The court in the cases cited went further than the necessities of this case require. It would have been sufficient for the purposes of this case if it had merely held (as it undoubtedly would have done, since the greater includes the less) that goods were to be considered as warehoused from the time entry for warehousing was made, although not actually deposited in the warehouse until later.

The fact that the Government has adopted an extremely liberal rule in the case of goods destroyed by accidental fire or other casualty is immaterial. (Treas. Decs., 1653 and 22,847.) Meritorious circumstances exist in such a case that are not here present. Whether the rule so adopted is correct, it is unnecessary to decide. But it appears from the later decision that

beyond checking off the goods the inspectors have nothing to do after the issuance of the delivery permit. Moreover the goods there referred to were not warehoused, but were entered for consumption and were burned upon the wharf before removal could be expected, no negligence being imputable to the importer.

It is manifest that the only practical rule to adopt is that goods must be considered as withdrawn when a permit to deliver is issued. Some definite time must be fixed upon in order that the duties may be properly estimated. As soon as withdrawal entry is made a permit to deliver is issued if the estimated duties as then ascertained are paid. (R. 34.) When that is done, the act of withdrawal has, in the eye of the law, been consummated. Removal of the goods follows later and is a separate and independent act, with which the collector is not concerned, as he has already estimated the duties according to the rate in force when the permit to deliver is issued, and such duties have been paid.

This rule was adopted by the Treasury Department from the first in applying the Cuban treaty:

> Products of Cuba previously imported *for which no permit to deliver has been issued* are subject to provisions of Cuban reciprocity treaty if entered or withdrawn after midnight of December 26, 1903.
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> Treasury Decision 24,855, December 29, 1903.
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> Treasury Decision 29,924, January 20, 1904.

III.

As to the effect of liquidation after the treaty became operative.

To hold that because liquidation occurred after the treaty became operative entitled the goods to the benefit of its terms would be to make the date of liquidation and not the date of withdrawal the determining factor, contrary to section 20 of the Customs Administrative Act, as amended.

The law does not prescribe the time in which liquidation shall be made; the only limitation upon the action of the collector being that, after once liquidating, he may not, in the absence of fraud or protest, reliquidate after a year from the date of entry—act of June 22, 1874, chapter 391, section 21. (*Abner Doble Co.* v. *United States*, 119 Fed., 152; *United States* v. *De Rivera*, 73 Fed., 679; *Gandolfi* v. *United States*, 74 Fed., 549.) In *Merritt* v. *Cameron* (137 U. S., 542, 549–551), this court held that liquidation need not necessarily be postponed until the date of final withdrawal, but "should follow, in the regular course of business, as soon after the entry as is *convenient*, just as in the case of merchandise entered for immediate consumption.

The date of liquidation is important only in its bearing upon the time for making protest and reliquidation.

There is no provision in the treaty with Cuba, or the act of Congress in execution of it, requiring the liquidation or reliquidation of goods previously entered in accordance with its terms. This shows that the treaty and act were not intended to be retroactive in

any respect. In the Burr case, referring to the effect of liquidation of previously entered goods subsequent to the tariff act of August 28, 1894, the court said (159 U. S., 83–84):

> The duties under consideration were paid August 8, and the merchandise delivered on August 11, but it was not until August 28 that the fact was stamped on the entry that the goods were liquidated as entered. There was no change in the classification, and no additional duty was demanded or collected, and the payment made at the time of entering the merchandise for consumption was the payment of duties. (*Barney* v. *Rickard*, 157 U. S. 352.) The original assessment of duty was right, and the final liquidation was the same, and there was no specific provision in the act of 1894 requiring a liquidation at the rates under that act. How, then, can it be held that the act of October 1, 1890, was intended to be repealed by retroaction?

It thus appears that the estimated duties paid at the time of withdrawal are *the* duties.

The judgment of the Circuit Court should be affirmed.

Respectfully submitted.

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